Supreme Court, U.S.
FILED
JUL 14 1997
CLERK

No. 96-1970

In The

Supreme Court of the United States

October Term, 1996

MUKESH SHRETTA AND GOLD RUSH II, INC. d/b/a CLUB TAJ MAHAL,

Petitioners,

vs.

THE CITY OF MARIETTA, GEORGIA, BETTY L. HUNTER, M.C. PETE WALDREP, JR., DANIEL O. COX, SR., E. PAUL SABISTON, JAMES C. DODD and FRANK T. AYERS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL A. O'QUINN
BARNHART, O'QUINN
& WILLIAMS, LLP
162 Keys Ferry Street
McDonough, Georgia 30253
(770) 898-0333

DOUGLAS R. HAYNIE
Counsel of Record
EMILIE K. PETROVICH
HAYNIE & LITCHFIELD, P.C.
222 Washington Avenue
Marietta, Georgia 30060
(770) 422-8900

Attorneys for Respondents

71510 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

45 pp

LIST OF INTERESTED PARTIES

The Petitioners are Mukesh Shretta and Gold Rush II, Inc. d/b/a Club Taj Mahal as listed in the caption.

The Respondents are correctly identified in the caption. The Respondent City of Marietta has no parent or subsidiary companies. The City of Marietta is a political subdivision of the State of Georgia.

TABLE OF CONTENTS

	Page
List of Interested Parties	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	1
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	1
B. Correction of Misstatements in the Petition.	3
Reasons for Denying the Writ	5
I. A Distinction Between Zoning Ordinances And Licensing Ordinances Does Not Violate The Equal Protection Clause Of The Fourteenth Amendment And Therefore, There Is No Federal Question To Be Considered By This Court.	6
II. The Georgia Supreme Court Has Correctly And Consistently Applied The Holding Of This Court Set Forth In *City of Renton v. Playtime Theaters, Inc.* And There Is No Merit To Petitioner's Argument That The Respondents Were Required To Undertake A Study Of The Adult Entertainment Establishments In This Case.	12

Contents

Page

III. This Court Has No Jurisdiction To Consider Petitioner's Due Process Arguments Regarding Twenty-Four Hours Notice, No Opportunity To Present Evidence, No Cross-Examination, And Ten Minutes Presentation At The Public Hearing. 18

IV. As Petitioners Did Not Have A Vested Right To The Renewal Of Their Licenses, Their Argument That Their Property Has Been Taken Without Just Compensation In Contravention Of The Fifth And Fourteenth Amendments Must Fail. 20

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Atkins v. Parker, 472 U.S. 115 (1985) 20

Barker v. County of Forsyth, 248 Ga. 73, 281 S.E. 2d 549 (1981) 8

Barnes v. Glen Theatre, 501 U.S. 560 (1991) 9, 13

Board of Regents v. Roth, 408 U.S. 564 (1972) 20, 21

Bosselman v. State of Nebraska, 432 N.W. 2d 226 (Neb. 1988) 21

Contents

Page

Bowman v. Knight, 263 Ga. 222, 430 S.E. 2d 582 (1993) 7

Bundo v. Walled Lake, 238 N.W. 2d 154 (Mich. 1976) 21

Chambers d/b/a "Neon Cowboy" v. Peach County, 266 Ga. 318, 467 S.E. 2d 519 (1996) 3, 9, 18

City of Ramsey v. Holmberg, 548 N.W. 2d 302 (Minn. App. 1996), *cert. denied*, __ U.S. __ (1997) 15

City of Renton v. Playtime Theaters, Inc., 457 U.S. at 51 ..... 12, 13, 14, 15, 16, 17

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 6

Club Southern Burlesque, Inc. v. City of Carrollton, 265 Ga. 528, 457 S.E. 2d 816 (1995) 3, 14

Cobb County v. Peavy, 248 Ga. 870, 286 S.E. 2d 732 (1982) 8, 9

Craven v. Lowndes County Hosp. Authority, 263 Ga. 657, 437 S.E. 2d 308 (1993) 6

Dekalb County v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 281 S.E. 2d 525 (1981) 7

Contents

	Page
Discotheque, Inc. v. City Council of Augusta, 264 Ga. 623, 449 S.E. 2d 608 (1994)	3
Dixon v. City of Perry, 262 Ga. 212, 416 S.E. 2d 279 (1992)	7, 9
Dudley's Food & Spirits v. College Park, 265 Ga. 618, 458 S.E. 2d 823 (1995)	14
Dukes v. State, 1997 WL 20912 (Ga. App. 1997)	18, 19
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	7
Ficarra v. Department of Regulatory Agencies, 849 P.2d 6 (Colo. 1993)	22
44 Liquormart v. Rhode Island, 517 U.S. __, 116 S. Ct. 1495 (1996)	2
Foster v. Ga. Bd. of Chiropractic Exam., 257 Ga. 409(14), 359 S.E. 2d 877 (1987)	7
Goldrush II, Inc. v. City of Marietta, 267 Ga. 683, 482 S.E. 2d 347 (Ga. 1997), *reconsideration denied*, April 3, 1997, *petition for cert. filed*, (U.S. June 12, 1997) (No. 96-1970)	1
Gravely v. Bacon, 263 Ga. 203, 429 S.E. 2d 663 (1993)	3
Harris v. Entertainment Sys. Inc., 259 Ga. 701, 386 S.E. 2d 140 (1989)	3

Contents

Page

ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994) 14, 15

Kim v. McCullom, 222 Ga. App. 439, 474 S.E. 2d 654 (1996) 19

Las Fuentes, Inc. v. City of Chicago, 567 N.E. 2d 1093 (Ill. App. Ct. 1991) 21

Love v. Whirlpool Corp., 264 Ga. 701, 449 S.E. 2d 602 (1994) 7

Lucas v. South Carolina Coastal Council, 505 U.S. 1009 (1992) 23

Mitchell v. Com'rs of Com'n on Adult Ent. Est., 10 F.3d 123 (3rd Cir. 1993) 15

Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716 (8th Cir. 1995) 22

11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990) 16, 17

Paramount Pictures v. Busbee, 250 Ga. 252, 297 S.E. 2d 250 (1982) 2, 3, 5

Parker v. Whitfield County, 265 Ga. 829, 463 S.E. 2d 116 (1995) 3

Contents

	Page
Parking Ass'n v. City of Atlanta, Ga., 264 Ga. 764, 450 S.E. 2d 200 (1994)	7
Pel Assoc., Inc. v. Joseph, 262 Ga. 904, 427 S.E. 2d 264 (1993)	3
Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989)	22
Quetgles v. City of Columbus, 264 Ga. 708, 450 S.E. 2d 677 (1994)	3
Ranch House, Inc. v. City of Anniston, 678 So. 2d 745 (Ala. 1996)	10
Recycle and Recover, Inc. v. Georgia Board of Natural Resources, 266 Ga. 253, 466 S.E. 2d 197 (1996)	10, 11
Replogle v. Commonwealth, 506 A.2d 499 (Penn. 1986)	21, 22
Romer v. Evans, __ U.S. __, 116 S. Ct. 1620 (1996)	6
Secret Desires Lingerie, Inc. v. City of Atlanta, 266 Ga. 760, 470 S.E. 2d 879 (1996)	3, 18
S.J.T., Inc. v. Richmond County, 263 Ga. 267, 430 S.E. 2d 726 (1993)	3, 23, 24
Threatt v. Fulton County, 266 Ga. 466, 467 S.E. 2d 546 (1996)	23

Contents

Page

Triple A Services, Inc. v. Rice, 545 N.E. 2d 706 (Ill. 1989) 22

Union City Bd. of Zoning v. Just Outdoor, 266 Ga. 393, 467 S.E. 2d 875 (1996) 6

United States v. O'Brien, 391 U.S. 367 (1968) 2

World Famous Dudley's Food & Spirits, Inc. v. City of College Park, 265 Ga. 618, 458 S.E. 2d 823 (1995) 3

Yarbrough v. City of Carrollton, 262 Ga. 444, 421 S.E. 2d 72 (1992) 3

Yee v. City of Escondido, 503 U.S. 519 (1992) 18

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 15

Zenco Development Corp. v. City of Overland, 843 F.2d 1117 (8th Cir. 1988) 22

Statutes Cited:

28 U.S.C. § 1257 18

28 U.S.C. § 1257(a) 1

Marietta City Code, Section 8-4-140 11

Contents

	Page
Marietta City Code, Section 8-8-2-220(B)	20
Marietta City Code, Section 8-8-2-220(C)	20
O.C.G.A. § 3-2-7	12, 22
O.C.G.A. § 50-14-1	19
United States Constitution Cited:	
First Amendment	2, 3, 9
Fifth Amendment	20
Fourteenth Amendment	6, 20, 21
Twenty-First Amendment	2, 5
Rules Cited:	
Georgia Supreme Court Rule 22	19
Supreme Court Rule 15.1	4
Other Authority Cited:	
8 McMillian, Municipal Corporations, § 25.12	8

Contents

Page

APPENDIX

Appendix A — Code of Ordinance of the City of Marietta, Georgia, Section 8-5032 ..... 1a

Appendix B — Annual Business License of Mukesh Shretta 5a

Appendix C — Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia 6a

Appendix D — Official Code of Georgia Annotated, Section 3-2-7 ..... 7a

Appendix E — Affidavit of Councilman Frank T. Ayers 8a

The Respondents, City of Marietta *et al.* hereby oppose the petition of Petitioners, Mukesh Shretta and Gold Rush II, Inc. d/b/a Club Taj Mahal for a writ of certiorari to review the decision of the Georgia Supreme Court decided March 17, 1997, and request that the Court deny the petition for the reasons set forth below. The Georgia Supreme Court opinion is reported as *Goldrush II, Inc. v. City of Marietta*, 267 Ga. 683, 482 S.E. 2d 347 (Ga. 1997), *reconsideration denied*, April 3, 1997, *petition for cert. filed*, (U.S. June 12, 1997) (No. 96-1970). For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix 1 of the petition.

The opinion of the Cobb County Superior Court filed April 2, 1996 is unreported and all references to that opinion will be to the opinion attached as Appendix 2 of the petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) over questions I, II and IV but cannot properly exercise jurisdiction over question III as it was not properly presented to the Georgia Supreme Court. *See* p. 18 below.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

This case is one of many in a long line of cases where the Georgia courts have been asked to review the regulation of nude dancing. Petitioners first filed this case in Cobb County Superior Court challenging an amendment to the City of Marietta's ("City") adult entertainment ordinance which prohibited alcohol in adult entertainment establishments. After an extensive hearing, the trial court granted summary judgment to the City, and Petitioners appealed the decision to the Georgia Supreme Court. In a 6-1

decision, the Georgia Supreme Court affirmed the grant of summary judgment by the trial court to the City of Marietta, the City Council and the Mayor, finding that the amendment was content-neutral and therefore, constitutional. Although the Georgia Supreme Court rejected the analysis of the trial court which relied on the Twenty-First Amendment[1] it held that such error was harmless in light of the trial court's reliance on Georgia's traditional First Amendment analysis set forth in *Paramount Pictures v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). After finding that the ordinance at issue was content-neutral based on the City of Marietta's goal of combatting pernicious secondary effects associated with adult entertainment establishments, the Georgia Supreme Court applied the *Paramount Pictures* three-prong test[2] to the facts of the instant case and held that the City's interest in reducing crime and preventing the deterioration of neighborhoods were important government interests; such interests were unrelated to the suppression of speech; and that the ordinance's application was sufficiently narrow to achieve such interests. Accordingly, the Court concluded that the ordinance was a proper exercise of the City's police powers.[3]

In reaching this conclusion, the Georgia Supreme Court applied

---

1. "It is now clear that Georgia's ratification of a 'mini Twenty-First Amendment' to the state constitution provided the means by which the State delegated to local government its authority to regulate alcohol, but its passage does not affect the analysis to be given a statute or ordinance which allegedly impinges upon the constitutionally-guaranteed right of free speech and expression. Thus, application of our tripartite *Paramount Pictures* test or the First Amendment analytical framework from which it is derived remains appropriate for content-neutral legislation." Appendix 1 at 12.

2. The *Paramount Pictures* test is derived from the analytical framework applied by federal courts when measuring legislative enactments against the First Amendment of the United States Constitution. *See United States v. O'Brien*, 391 U.S 367 (1968).

3. *See 44 Liquormart v. Rhode Island*, 517 U.S. __, 116 S. Ct. 1495 (1996).

Georgia's longstanding First Amendment analysis.[4] The petition sets forth no compelling reason for this Court to review Georgia's free expression analysis as set forth in *Paramount Pictures*.

B. Correction of Misstatements in the Petition.

The Georgia Supreme Court opinion correctly sets forth the facts of this case and is attached to Petitioners' petition as Appendix 1. Petitioners' Statement of Facts are identical to those set forth in Petitioners' brief filed with the Georgia Supreme Court. Respondents point out the following factual discrepancies which Petitioners did not correct below:

Petitioners are incorrect in their statement that the Council for the City of Marietta considered *only* the studies and a report of the Chief of Police. Not only were ten (10) studies[5] detailing the

---

4. *Harris v. Entertainment Sys. Inc.*, 259 Ga. 701, 386 S.E. 2d 140 (1989); *Yarbrough v. City of Carrollton*, 262 Ga. 444, 421 S.E. 2d 72 (1992); *Pel Assoc., Inc. v. Joseph*, 262 Ga. 904, 427 S.E. 2d 264 (1993); *Gravely v. Bacon*, 263 Ga. 203, 429 S.E. 2d 663 (1993); *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E. 2d 726 (1993); *Discotheque, Inc. v. City Council of Augusta*, 264 Ga. 623, 449 S.E. 2d 608 (1994); *Quetgles v. City of Columbus*, 264 Ga. 708, 450 S.E. 2d 677 (1994); *Club Southern Burlesque, Inc. v. City of Carrollton*, 265 Ga. 528, 457 S.E. 2d 816 (1995); *World Famous Dudley's Food & Spirits, Inc. v. City of College Park*, 265 Ga. 618, 458 S.E. 2d 823 (1995); *Parker v. Whitfield County*, 265 Ga. 829, 463 S.E. 2d 116 (1995); *Chambers d/b/a "Neon Cowboy" v. Peach County*, 266 Ga. 318, 467 S.E. 2d 519 (1996); *Secret Desires Lingerie, Inc. v. City of Atlanta*, 470 S.E. 2d 879 (1996).

5. The studies reviewed by the Mayor and the Marietta City Council prior to the adoption of the ordinance at issue included those from the cities of Austin, Texas; Dallas, Texas; Houston, Texas; St. Paul, Minnesota; Minneapolis, Minnesota; Indianapolis, Indiana; and Los Angeles, California. The trial court noted that three of the studies reviewed by the City had previously been approved by the appellate courts. (*See* Appendix 2 at 44-45). In addition to the studies, the Council also reviewed a 1991 Atlanta Business Chronicle article on the adult entertainment business in Atlanta, Georgia.

pernicious secondary effects of the sale of alcohol in adult entertainment establishments and consisting of a total of five hundred and six (506) pages placed in the record, but eighteen (18) persons testified before the Marietta City Council on both sides of the issue. Specifically, four lawyers representing the adult entertainment clubs testified. The owner of a "juice bar" which offers nude dancing without the sale of alcohol testified that a "juice bar" was an economically viable venture. An expert real estate appraiser testified that property values surrounding the adult entertainment establishments had declined. The Chief of Police not only presented his report but testified at length regarding the issue of crime.

The hearing lasted approximately four (4) hours and the transcript of the public hearing is one hundred and seventy four (174) pages in length. After consideration of all testimony and evidence, Respondents voted six to one to amend its ordinance. Each member of council testified under oath in deposition that they had read and considered each study. Additionally, many of the members of council testified that they had attended meetings of the Georgia Municipal Association and/or the National League of Cities at which the pernicious secondary effects of the sale of alcohol at nude dance clubs had been discussed, reviewed and studied. It is apparent from the evidence that the Respondents considered *specific* evidence of the pernicious secondary effects of adult entertainment establishments and that the six members of the council reasonably believed the studies to be relevant to the problems addressed by the ordinance.

Pursuant to United States Supreme Court Rule 15.1, Respondents also bring the following misstatements of facts contained in the petition to the Court's attention:

The copy of the ordinance attached as Appendix 6 to the petition is not the ordinance passed by the City of Marietta and at

issue in this case. It cannot be claimed that the ordinance was misprinted as it differs substantially from the ordinance in the record before the trial court and the Georgia Supreme Court. Specifically, the ordinance attached to the petition omits two full sections, adds a sentence not contained in the ordinance passed by the Marietta City Council, and contains an incorrect reference to the Georgia Constitutional Amendment adopting the Twenty-First Amendment to the United States Constitution. The reference to the Georgia Constitutional Amendment does not even exist in the ordinance. Accordingly, Petitioners have misled this Court, either intentionally or unintentionally, and the petition should be denied for this reason alone. The Court cannot review the questions presented based on an ordinance never presented to the trial court or the Georgia Supreme Court.

For the record, a true and correct copy of the ordinance at issue in this case as adopted by the Marietta City Council is attached as Appendix A to this Opposition Brief. The correct ordinance contains all of the provisions of the ordinance including subparagraph (c) regarding the police power and a correct reference in subparagraph (b) to the appropriate section of the Georgia Constitution. The ordinance includes the correct licensing restriction as well as the saving clause for mainstream opera houses which are deleted from the ordinance submitted by Petitioners.

REASONS FOR DENYING THE WRIT

This is a case applying Georgia's free expression analysis as set forth in the case of *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). This case has been correctly analyzed and decided by the Georgia Supreme Court and prior to that by the Cobb County Superior Court. Therefore, two courts have reviewed the facts of the case and found the amendment to the City's adult entertainment ordinance to be constitutional. The petition for writ of certiorari does not identify any legal issue warranting further review.

I.

A DISTINCTION BETWEEN ZONING ORDINANCES AND LICENSING ORDINANCES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND THEREFORE, THERE IS NO FEDERAL QUESTION TO BE CONSIDERED BY THIS COURT.

Petitioners are correct in pointing out that the test to be utilized in analyzing an equal protection claim is that reaffirmed by this Court in *Romer v. Evans*, __ U.S. __, 116 S. Ct. 1620, 1627 (1996) that distinctions made by state governments must "bear a rational relation to some legitimate end". This is identical to the analysis adopted by the Georgia courts which is referred to as the "rational basis test". "Under this test, the court will uphold the statute if, under any conceivable set of facts, the classification bears a rational relationship to a legitimate end of government not prohibited by the [C]onstitution." *Union City Bd. of Zoning v. Just Outdoor*, 266 Ga. 393, 467 S.E. 2d 875 (1996), *quoting Craven v. Lowndes County Hosp. Authority*, 263 Ga. 657, 659, 437 S.E. 2d 308 (1993). If social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

Applying this analysis, the Georgia Supreme Court has stated that:

> [an] . . . ordinance does not offend the equal protection clauses of the State and Federal Constitutions if "it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation."

Parking Ass'n v. City of Atlanta, Ga., 264 Ga. 764, 450 S.E. 2d 200 (1994).

> If the validity of the legislative classification . . . [is] fairly debatable, the legislative judgment must be allowed to control.

Id. at 203, *quoting Dekalb County v. Chamblee Dunwoody Hotel Partnership*, 248 Ga. 186, 190, 281 S.E. 2d 525 (1981); *See also Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> The Fourteenth Amendment permits states wide discretion in enacting laws which affect some groups of citizens differently than others, the due process or equal protection safeguards contained therein being offended only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective. [Cit.] Therefore, unless a statutory classification is arbitrary, or not founded on any substantial distinction suggesting the necessity or propriety of such legislation, the courts have no right to interfere with the exercise of legislative discretion. . . . [Cit.]

Dixon v. City of Perry, 262 Ga. 212, 416 S.E. 2d 279 (1992); *Foster v. Ga. Bd. of Chiropractic Exam.*, 257 Ga. 409(14), 359 S.E. 2d 877 (1987).

Furthermore, it is not required that the distinction be perfect or the best one, and the courts do not focus on the fairness of the State law. *Love v. Whirlpool Corp.*, 264 Ga. 701, 449 S.E. 2d 602 (1994); *Bowman v. Knight*, 263 Ga. 222, 430 S.E. 2d 582 (1993). The distinction will be upheld if it is rationally related to a legitimate State interest. *Love* at 606.

Applying this analysis to the case at hand, it is clear that the distinction between zoning and licensing bears a rational relation to the object to be accomplished. The court explained the reason behind the distinction in *Cobb County v. Peavy*, 248 Ga. 870, 286 S.E. 2d 732 (1982) as follows:

> Although the general aim of both zoning and licensing regulations is the promotion of the general welfare, each is independent of each other and seeks to accomplish its purpose by different means. The fact that a zoning ordinance permits a use in a particular district does not authorize the use there without a license. On the other hand, a license or permit does not authorize a use in violation of the zoning laws. In other words, a license or permit does not relieve one from complying with a zoning ordinance, and this generally is true of astate license or permit.

Id. at 734, *quoting* 8 McQuillan, Municipal Corporations, § 25.12.

Relying on this distinction, the court in *Peavy* concluded that the issuance of a building permit or a substantial change in position by expenditures upon the probability of the issuance of a building permit[6] will create a vested right under existing zoning ordinances but the issuance of a business license[7] does not bestow vested rights. *See also Barker v. County of Forsyth*, 248 Ga. 73, 76, 281 S.E. 2d 549 (1981).

---

6. The court in *Peavy* defined "building permit" as an official certificate that the proposed structure and use are in conformity with all zoning regulations.

7. A "business license" is contrasted with a zoning permit and typically not a device for ensuring compliance with zoning ordinances.

In this case, the distinction between zoning and licensing is applied to all persons similarly situated and not just to Petitioners. Although Petitioners may disagree with the distinction made by the Georgia courts, its petition fails to present any evidence that the underlying purpose of the distinction as set forth by the court in *Peavy* was irrational or that the means of effecting that purpose were chosen arbitrarily or capriciously. Failure to meet the burden of proving that a distinction is irrational or arbitrary is fatal. It was for this reason that the court rejected plaintiff's equal protection challenge in *Dixon v. City of Perry*, 262 Ga. 212, 416 S.E. 2d 279 (1992). In rejecting the claim, the court found that the City established a facially valid purpose and that the plaintiff did not carry his burden of controverting the reasonableness of the ordinance. The court concluded:

> If any reasonable state of facts can be conceived that would sustain the classification, existence of that state of facts at the time the law was enacted must be assumed, and one who assails such law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 280.

For the same reason, Petitioners equal protection challenge must fail here.

Petitioners' only claim is that the distinction between zoning and licensing has a chilling effect on protected speech.[8] However,

---

8. It is recognized that nude dancing is considered "expressive conduct" within the outer perimeters of the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). This is not to say that such expressive conduct may not be restricted or regulated in any way. *Chambers d/b/a "Neon Cowboy" v. Peach County*, 467 S.E. 2d 519, 521 (Ga. 1996).

the evidence clearly contradicts this statement. The ordinance, and the distinction made by the Georgia Supreme Court, are not directed at speech or expression but merely at a type of conduct. The City met its burden of showing that the purpose of the ordinance was the prevention of crime and not to restrict adult entertainment. In fact, the application of the amendment does not prohibit nude dancing but simply prohibits the consumption of alcohol to occur simultaneously with adult entertainment.

As pointed out by the concurring opinion in *Ranch House, Inc. v. City of Anniston*, 678 So. 2d 745 (Ala. 1996), this type of ordinance only restricts the activities of the spectators and not the dancers' freedom of expression. *Id.* at 747. In that case, the City of Anniston enacted an ordinance almost identical to the City of Marietta which prohibited the consumption of alcohol in connection with the presentation of nude dancing. The Alabama Supreme Court upheld the ordinance finding that it was a valid exercise of the state's police powers and did not violate the State Constitution.

Petitioners also claims that the holding of the Georgia Supreme Court in the case of *Recycle and Recover, Inc. v. Georgia Board of Natural Resources*, 266 Ga. 253, 466 S.E. 2d 197 (1996) is inconsistent with the court's holding in this case. However, the facts of *Recycle* are distinguishable from those of this case.

In *Recycle*, the Georgia Board of Natural Resources issued a permit to plaintiff for construction of a landfill. Plaintiff then applied for a permit for a major modification, but *after* the application was filed, the state legislature amended the statute to prohibit any major modification within a three year period from the commencement of operations. The permit application was denied. The Georgia Supreme Court held that the denial was improper finding that a property owner has a vested right to consideration of his application under the statutory laws in existence at the time the application is

filed and the amendment passed by the legislature could not be applied retroactively.

In this case, the facts are entirely different. Here, the City amended its adult entertainment ordinance in January 1995 but delayed its effective date as to the three existing clubs until January 1996. The Petitioners' current licenses were not in any way affected by the amendment. The Petitioners did not have an application pending at the time the ordinance was amended like the plaintiff in *Recycle*. The permit issued to the plaintiff in *Recycle* had not expired at the time the application for modifications had expired. Petitioners in this case have continually ignored and refused to acknowledge the undisputed fact that their licenses expired on December 31st of each year.[9] Therefore, when Petitioners' applications for renewal were due in January of 1996, the law in effect was the City's amendment to the statute. In other words, the principle established by the Georgia Supreme Court in *Recycle* that an application be considered under the laws in existence *at the time the application is filed* was applied to the Petitioners. Accordingly, the opinion in *Recycle* is consistent with the City's prospective application of the adult entertainment ordinance. The City did not apply the amendment retroactively as found in *Recycle*.

Petitioners also fail to recognize that the reason that they have a vested right in the use of their property under zoning principles is because a zoning permit is issued for a perpetual duration. It is not issued on an annual basis and Petitioners do not have to reapply for zoning approval every year. The zoning permit does not on its face state an expiration date. On the other hand, the alcohol license and adult entertainment license issued to Petitioners clearly stated on the face of the license that it expired on December 31st,[10] and

---

9. *See* Section 8-4-140 of the Marietta City Code.

10. A copy of Petitioners' 1995 beer/wine license is attached as Appendix B.

Petitioners were aware that they must annually apply for both licenses. The State Code also imposes the same requirements of annual renewal for a liquor license.[11]

Petitioners are correct when they state that the issue is not merely a nude dancing issue. The requirement that a business obtain an annual license is applied to every business and not just to Petitioners. This demonstrates that Petitioners' equal protection rights were not violated.

II.

THE GEORGIA SUPREME COURT HAS CORRECTLY AND CONSISTENTLY APPLIED THE HOLDING OF THIS COURT SET FORTH IN *CITY OF RENTON v. PLAYTIME THEATERS, INC.* AND THERE IS NO MERIT TO PETITIONER'S ARGUMENT THAT THE RESPONDENTS WERE REQUIRED TO UNDERTAKE A STUDY OF THE ADULT ENTERTAINMENT ESTABLISHMENTS IN THIS CASE.

Petitioners accuse the Georgia judiciary of misconstruing *City of Renton v. Playtime Theaters, Inc.* since this Court's decision over twelve years ago. In that landmark case, this Court established the yardstick by which hundreds of adult entertainment ordinances have been measured. The Court held:

> The First Amendment does not require a city, before enacting an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long

---

11. O.C.G.A. § 3-2-7 provides that all licenses shall expire on December 31 of each year and an application for renewal shall be made annually on or before November 1. *See* Appendix D.

> as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

457 U.S. at 51.

Contrary to Petitioners' contentions, this Court did not qualify that opinion by requiring the studies which are considered to be in close proximity to the city in which the business is located nor did this Court require that the studies be conducted within a two, five or ten year period prior to the adoption of a municipal regulation. Rather, the Court simply required that a city consider *specific* evidence of pernicious secondary effects and that the city reasonably believe such to be relevant to the problems addressed by the city. In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), Justice Souter's opinion expressly rejects a requirement of affirmative evidence of secondary effects. Justice Souter observed:

> In light of Renton's recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes . . . I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

Id. 501 U.S. at 584-85.

The Georgia Supreme Court adopted the holding of *City of Renton* in its analysis and explained:

> It was not incumbent upon the city to prove the efficacy of the studies. To the contrary, the city was only required to prove that it considered "specific evidence of pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed by the ordinance."

Dudley's Food & Spirits v. College Park, 265 Ga. 618, 458 S.E. 2d 823 (1995), *citing Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 457 S.E. 2d 816 (1995).

The Petitioners in this case correctly acknowledge that the burden was on the City of Marietta to prove that it reasonably believed the studies to be relevant to the issues faced by the City of Marietta, and as both the trial court and Georgia Supreme Court noted, the City carried this burden.[12]

In reviewing the effect of this Court's holding in *City of Renton*, it is clear that it has become the basis for almost all ordinances regulating adult entertainment. Numerous other courts applying the test set forth in *City of Renton* have applied its holding in exactly the same manner as the Georgia Supreme Court. In *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994), the owner of an adult bookstore argued that the city was unreasonable in relying upon other cities' studies since such studies did not specifically address businesses similar to his business. The Eighth Circuit rejected this argument finding that the city relied on studies found relevant to the problems faced by the city and "measured adverse secondary effects linked to adult businesses

---

12. The opinion of the Georgia Supreme Court sets forth in detail the measures the City of Marietta took prior to the adoption of the ordinance as well as the specific evidence considered by the City. (Appendix 1 at 14-15).

generally-higher crime, neighborhood deterioration, lower property values, and an increase in transients . . ." *Id.* at 1417 (emphasis added). The Eighth Circuit concluded that:

> [u]nder *City of Renton*, Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester "must be allowed a reasonably opportunity to experiment with solutions to admittedly serious problems."

Id. at 1418, *quoting Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion).

Two years later, the owner of an adult business attempted to utilize the same argument before the Court of Appeals of Minnesota and it was again rejected. In *City of Ramsey v. Holmberg*, 548 N.W. 2d 302 (Minn. App. 1996), *cert. denied*, __ U.S. __ (1997), the Court of Appeals cited *ILQ Investments v. City of Rochester* and concluded that the city's reliance on voluminous studies, reports and reference materials satisfies the *City of Renton* test and found that the city had sufficient information about adult businesses in general to enact a valid ordinance. *See also Mitchell v. Com'rs of Com'n on Adult Ent. Est.*, 10 F.3d 123, 133 (3rd Cir. 1993) {Under *Renton*, a city or state may rely heavily on the experience of, and studies produced by, other cities and states, as well as on court opinions from other jurisdictions.}

In support of their argument, Petitioners contend that there

have been no pernicious secondary effects connected with the operation of the three nude dance clubs in the City of Marietta. The City enacted the ordinance after consideration of numerous studies detailing the problems faced by other cities in connection with nude dancing and reasonably believed at the time the ordinance was passed that such studies were relevant to the problems faced by the City of Marietta. *See* Appendix E — Affidavit of Council Member. In retrospect, this belief has proved entirely reasonable and reinforces this Court's wisdom in the principle established by *City of Renton* that a city may rely on the experience of other cities in enacting its ordinances. That is because it has been shown that the experiences faced by other cities can happen anywhere.[13] In this case, on July 19, 1996, a patron entered the Cyprus Lounge,[14] an adult entertainment establishment within the city limits, and consumed alcoholic beverages for several hours while viewing nude dancing. The patron then got in his vehicle and left the Cyprus Lounge in a very intoxicated state. Shortly after leaving the Cyprus Lounge, the patron was involved in a collision with another vehicle in which he seriously injured the driver and killed the driver's wife of 63 years. The patron entered a guilty plea to the charges and is currently serving his sentence as a result of the above incident.[15]

---

13. The Fourth Circuit observed in *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990) that: "we find it reasonable for local legislative bodies to take notice or assume matters of common knowledge and experience. As countless cases addressed by this court and courts across the nation will confirm, there are notorious and self-evident conditions attendant to the commercial exploitation of human sexuality which do not vary greatly among generally comparable communities . . ." *Id.* at 1423.

14. Cyprus Lounge was an appellant in the case below and one of three consolidated in the Superior Court of Cobb County and decided in consolidated appeals by the Georgia Supreme Court.

15. A wrongful death suit has been filed by the family against the patron and the Cyprus Lounge. Paragraph Seven (7) of the Complaint states:

(Cont'd)

Although the above incident occurred after the adoption of the ordinance by the City of Marietta[16], it is solid proof that the pernicious secondary effects of the sale of alcohol in connection with adult entertainment results in increased crime and in this case, the unfortunate death of an elderly lady.

In fact, the above incident supports the 506 pages of studies, the testimony of the Chief of Police, the Atlanta Business Chronicle article, the 18 witnesses who testified before Council, and the material distributed to Council members at annual municipal meetings, all of which were considered by the Council prior to the adoption of the ordinance. The City is not required to wait until something tragic happens to enact an ordinance regulating the sale of alcohol and adult entertainment. The City wisely relied upon the studies of other communities in proactively passing an ordinance which separates alcohol and adult entertainment. The incident which then occurred after the passage of the ordinance shows that it was the right decision.

The cases relied upon by Petitioners are inapposite as the courts

---

(Cont'd)

"[a]fter consuming numerous other alcoholic beverages, Defendant Adamson was induced to purchase and consume one of the aforementioned 'shooters' by a waitress/employee of The Cyprus Lounge who held a vial containing a 'shooter' between her bare breasts and poured it into Defendant Adamson's mouth."

16. Although supplemental materials cannot sustain regulations where there is no evidence of secondary effects in the pre-enactment legislative record, it can be considered to supplement a record of evidence of pernicious secondary effects. *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415, 1425 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990). In this case, the record was supplemented after oral argument but prior to the decision of the Georgia Supreme Court. The Respondents provided the Georgia Supreme Court with a copy of the lawsuit detailing the incident of July 19, 1996.

in those cases found that the cities had failed to consider any studies at all prior to the enactment of the ordinance. In this case, it is undisputed that the City of Marietta followed the mandates of this Court by relying on specific evidence of pernicious secondary effects prior to the passage of its ordinance. The Georgia Supreme Court has diligently reviewed the evidence in the numerous adult entertainment cases presented to the Court, and consistently struck down those ordinances where the cities failed to follow the guidelines established by *City of Renton.*[17]

III.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S DUE PROCESS ARGUMENTS REGARDING TWENTY-FOUR HOURS NOTICE, NO OPPORTUNITY TO PRESENT EVIDENCE, NO CROSS-EXAMINATION, AND TEN MINUTES PRESENTATION AT THE PUBLIC HEARING.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below.) The law in Georgia is equally clear: Appellate courts will not consider issues raised for the first time on appeal. *Dukes v. State*, 1997 WL 20912 (Ga.

17. In *Secret Desires Lingerie, Inc. v. City of Atlanta*, 266 Ga. 760, 470 S.E. 2d 879 (1996), the Georgia Supreme Court struck down an ordinance regulating lingerie modeling studios on the grounds that the city did not consider evidence of the pernicious secondary effects of such studios prior to enactment of the ordinance. Similarly, several months earlier, the Georgia Supreme Court in *Chambers d/b/a "Neon Cowboy" v. Peach County*, 266 Ga. 318, 467 S.E. 2d 519 (1996) struck down an ordinance regulating adult entertainment finding that the county had not relied on evidence reasonably related to the problem of undesirable secondary effects of such businesses. *See also Discotheque, Inc. v. City Council of Augusta*, 264 Ga. 623, 449 S.E. 2d 608 (1994).

App. 1997); *Kim v. McCullom*, 222 Ga. App. 439, 474 S.E. 2d 654 (1996). Furthermore, arguments included as enumerations of error in the court below which are unsupported by argument or citation of authority are deemed abandoned. *See* Rule 22 of the Georgia Supreme Court Rules.

In this case, Petitioner presents a question that was not properly preserved for review. The issue of due process in the context of the adequacy of twenty-four notice, cross-examination, an opportunity to present evidence and ten minutes presentation was an argument presented to the trial court. The trial court properly concluded that because Petitioners did not have a property interest or vested right in their licenses, they were not entitled to cross-examination at the public hearing. The trial court also concluded that the notice provided and procedure adopted by the City with respect to the hearing process were adequate. Upon appeal of the trial court's order, Appellant Boomer's was the only Appellant to raise the issue of the hearing procedures by enumeration of error. However, Boomer's failed to support such enumeration of error with supporting argument and citation of authority and therefore waived such argument pursuant to Rule 22 of the Georgia Supreme Court Rules. In this regard, the Georgia Supreme Court did not even address the issue and its opinion does not in any way reference the due process claims as related to questions of cross-examination, opportunity to present evidence, notice of the public hearing and the hearing procedures. Therefore, this Court does not have jurisdiction to consider Petitioner's question III.

Notwithstanding Petitioner's waiver, there is no merit to the argument. Prior to the adoption of the ordinance at issue, the City posted notice of the public hearing and notified the existing adult entertainment establishments that a meeting would be held.[18] At

18. Notice was posted in accordance with O.C.G.A. § 50-14-1, Georgia's Open Meetings Act, and although not required by statute, all three adult entertainment clubs in the City were personally served with written notification more than twenty-four hours prior to the meeting. A copy of the notification was placed in the trial court record.

the public hearing, counsel for two of the adult entertainment clubs testified before City Council and were allowed an opportunity to be heard. Petitioners were not entitled to anything further since the ordinance was adopted as result of a legislative decision. "The legislative determination provides all the process that is due." *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985). This was not an administrative enforcement proceeding in which Petitioners' licenses were suspended or revoked due to misconduct or city code violations.[19] Instead, the Marietta City Council, through the legislative process, altered the conditions for obtaining a license beginning on January 1, 1996. The Ordinance does not apply only to the Petitioners but to all who apply for licenses in 1996. As to Petitioners' right to cross-examination, there is no such right. Cross-examination is an element of procedural due process which is implicated only where a vested right is threatened by government action. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). It was clearly established by the courts below that Petitioners did not have a vested right to the renewal of their licenses, and therefore, the right of cross-examination was not implicated in this case.

IV.

AS PETITIONERS DID NOT HAVE A VESTED RIGHT TO THE RENEWAL OF THEIR LICENSES, THEIR ARGUMENT THAT THEIR PROPERTY HAS BEEN TAKEN WITHOUT JUST COMPENSATION IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS MUST FAIL.

At the heart of the Georgia Supreme Court's opinion is the discussion of whether there is a property interest or vested right in the renewal of an annual license. "To have a property interest . . . , a person clearly must have more than an abstract need or desire for

---

19. *See* Marietta City Code, Section 8-8-2-220(B) and (C).

it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Although the United States Constitution does protect property under the due process clause of the Fourteenth Amendment[20], it does not define what is "property". That is because it is the power of the state and local governments to define "property". *Id.* "[P]roperty interests do not spring forth from the United States Constitution, but are created and defined by statutes, rules, or understandings 'that secure certain benefits and that support claims of entitlement to those benefits' " *Id.* It is not the label that is determinative but the application of the statute.

In this case, for the renewal of a license to fall under the protective umbrella of the Fourteenth Amendment, it must be considered property by the laws of the State of Georgia. Both the trial court and the Georgia Supreme Court concluded that the Petitioners did not have a vested property interest in the renewal of their licenses. Accordingly, the Petitioners have no Fourteenth Amendment protection, and there is no federal question presented for review to this Court.

At first glance, it appears there is a difference in opinion among the various jurisdictions as to whether a renewal of a license is a vested property right. Compare *Las Fuentes, Inc. v. City of Chicago*, 567 N.E. 2d 1093 (Ill. App. Ct. 1991) and *Replogle v. Commonwealth*, 506 A.2d 499, 500 (Penn. 1986) where the Illinois and Pennsylvania appellate courts held that the renewal of a liquor license is not a vested property interest with *Bundo v. Walled Lake*, 238 N.W. 2d 154 (Mich. 1976) and *Bosselman v. State of Nebraska*, 432 N.W. 2d 226 (Neb. 1988) where the Michigan and Nebraska Supreme Courts ruled that a licensee had a property interest in the renewal of a liquor license.

---

20. The Fourteenth Amendment to the United States Constitution provides that a state cannot take property without due process and just compensation.

However, a closer look reveals that the determination of property rights depends on the statute governing renewal. The state statutes dealing with renewal can be divided into two categories: those establishing a perpetual renewal and those establishing a provisional or annual renewal. Courts analyzing the former have concluded that there is a vested interest in renewal while no such interest exists where the renewal is annual or provisional.

In this case, Georgia's renewal statute for alcohol licenses is not perpetual. A liquor license in Georgia expires on an annual basis, and there is no guarantee of renewal. O.C.G.A. § 3-2-7. The licensee obtains a license with full knowledge that there are no assurances that the licensing requirements will remain the same. *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993). In *Ficarra*, the Supreme Court of Colorado held that a licensee who relies upon the requirements not changing does so at his own peril. *Id.* at 19.

It is recognized, however, that there is a vested right to the license for the term it is issued. *Replogle v. Commonwealth*, 506 A.2d 499, 500 (Penn. 1986). In this case, the Petitioners had a vested right to the license for the one year period and the Georgia Supreme Court recognized this right. However, once the license expires, the licensee's property interest expires, and he does not gain a new interest until the license is renewed. *Id.* Reliance by a licensee on renewal does not create a vested interest. Rather, it is the renewal statute which gives rise to a vested interest. *Triple A Services, Inc. v. Rice*, 545 N.E. 2d 706, 714 (Ill. 1989). *See also Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995); *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989); *Zenco Development Corp. v. City of Overland*, 843 F.2d 1117 (8th Cir. 1988).

As it is clear that Petitioners possessed no vested right to the renewal of its licenses based on their annual expiration, there has

been no "taking". Additionally, the "taking" claim must fail as Petitioners have not been deprived of all viable economic uses of their property. Therefore, Petitioner's reliance on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1009 (1992) is misplaced.[21]

First of all, this case is not a zoning case where Petitioners seek to alter the use of their land, but one which involves two business licenses. Further, in that case, this Court held that land use regulations that deny *all* economically beneficial or productive use of an entire parcel of land generally effect a taking. *Id.* at 2900 (emphasis added). However, this Court did not reach the taking issue as the case was then remanded to the South Carolina Supreme Court to identify principles of nuisance and property law.

In this case, Petitioners are not denied of *all* economic use of an entire parcel of land. The trial court reached this same conclusion and stated:

> [t]he Plaintiffs are free to continue the operation of their business as adult entertainment establishments, without the consumption of alcohol by their patrons, or as bars or nightclubs, without the provision of adult entertainment for their patrons.

(Appendix at 55).

Similarly, in *S.J.T., Inc. v. Richmond County*, 263 Ga. 267,

---

21. The condemnees in *Threatt v. Fulton County*, 266 Ga. 466, 467 S.E. 2d 546 (1996) attempted to rely on *Lucas v. South Carolina Coastal Authority, supra*, in support of their claim that their property had been taken without just compensation, and the court rejected this argument finding that *Lucas* did not apply where there had been no showing that the regulation at issue had deprived condemnees of any or all economically viable or beneficial use of their property. *Id.* at 550.

430 S.E. 2d 726, 730 (1993), the appellant argued that an ordinance regulating adult entertainment denied them due process by forcing them to derive income from sources other than from the sale of alcoholic beverages. The court found that the licenses issued to appellant did not establish any vested right, contractual or otherwise, to operate both a bar and offer nude dancing.

The Georgia Supreme Court simply concluded that without a property interest or vested right in the renewal of a license, there can be no argument that Petitioner's property has been taken without just compensation. *See* Appendix 1 at 28.

CONCLUSION

Respondent respectfully requests that Petitioner's Petition for a Writ of Certiorari be denied based on the reasons set forth above.

Respectfully submitted,

DOUGLAS R. HAYNIE
Counsel of Record
EMILIE K. PETROVICH
HAYNIE & LITCHFIELD, P.C.
222 Washington Avenue
Marietta, Georgia 30060
(770) 422-8900

MICHAEL A. O'QUINN
BARNHART, O'QUINN
& WILLIAMS, LLP
162 Keys Ferry Street
McDonough, Georgia 30253
(770) 898-0333

Attorneys for Respondents

APPENDIX A — CODE OF ORDINANCE OF THE CITY OF MARIETTA, GEORGIA, SECTION 8-5032

COUNCIL BILL NO. 400195 ORDINANCE BILL NO. 5399

AN ORDINANCE

Findings; Public Purpose; Legal Authority. (a) Based upon the experience of other urban counties and municipalities, which experiences we believe are relevant to the problems faced by City of Marietta, Georgia, and based upon a review of a report from the Marietta City Police Department summarizing the criminal activity surrounding the three (3) existing license holders within the City of Marietta, we take note of the notorious and self-evident conditions attendant to the commercial exploitation of human sexuality, which do not vary greatly among generally comparable communities within our country. Moreover, it is the finding of the City Council of Marietta that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment" or "adult entertainment", begets criminal behavior and tends to create undesirable community conditions. Among the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of such establishments in particular areas. Therefore, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and

undesirable community conditions normally associated with establishments which serve alcohol and also allow and/or encourage nudity. To that end, this Ordinance is hereby adopted.

(b) This ordinance is also adopted pursuant to the authority granted by Article III, Section VI, Paragraph VII of the Constitution of the State of Georgia.

(c) This ordinance is further adopted to protect the public safety, health and welfare.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA, THAT:

Section 1. The Code of Marietta, Georgia, is hereby amended to add section 8-5032 which shall read as follows:

"*8-5032*

a) No person, association, partnership or corporation licensed under Chapter 5 of Part 8 (8-5001 et seq.) of the Marietta City Code after the effective date of this ordinance shall serve, sell, distribute or suffer the consumption or possession of any intoxicating liquor, beer or wine or controlled substance upon the premises of any licensee. Any licensee whose license was granted prior to the adoption of this amendment shall not be subject to this amendment until December 31, 1995, at which time all licensees within the City of Marietta shall be subject to this provision,

including those licensees licensed before the effective date hereof.

b) This section (8-5032) shall not apply nor prohibit the live performance of legitimate plays, operas, ballets at mainstream theaters, concerts halls, museums or educational institutions holding a license, which derive less than twenty (20%) of its gross receipts from the sale of alcoholic beverages."

Section 2. It is hereby declared to be the intention of this Ordinance that its sections, paragraphs, sentences, clauses and phrases are severable, and if any section, paragraph, sentence, clause or phrase of this Ordinance is declared to be unconstitutional or invalid, it shall not affect any of the remaining sections, paragraphs, sentences, clauses or phrases of this Ordinance.

Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

Section 4. This Ordinance shall become effective upon the signature or without the signature of the Mayor, subject to Georgia laws 1983, page 4119.

DATE: January 19, 1995 APPROVED:

s/ Ansley L. Meaders
ANSLEY LITTLE MEADERS, Mayor

Appendix A

ATTEST:

s/ Sheila R. Hill
SHEILA R. HILL, City Clerk

APPROVED AS TO FORM:

s/ Douglas R. Haynie
DOUGLAS R. HAYNIE, CITY ATTORNEY

BEST AVAILABLE COPY

City Of Marietta Business License Division

205 LAWRENCE ST., N.E. • DRAWER 609 • MARIETTA, GA. 30061

404-528-0590

BUSINESS LICENSE

PLEASE DISPLAY AT ALL TIMES

SUBJECT TO ALL ORDINANCES OF MAYOR AND COUNCIL

NOT TRANSFERABLE

LICENSE NUMBER 95-21273

ACCOUNT NO 9901117 5813035
REVENUE CODE

FOR YEAR 1995
THIS LICENSE EXPIRES 12/31/95
BEGIN OPERATION DATE 0/00/00

COMPANY

CLUB TAJ MAHAL
1830 COBB PARKWAY SOUTH
MARIETTA GA 30062-3755

NOTIFY THIS OFFICE OF ANY CHANGE OF ADDRESS, OWNERSHIP, FIRM NAME, OR CLASSIFICATION.

OWNER: SHRETTA MUKESH 404-000-0000

LICENSE DESCRIPTION

BEER/WINE CONSUMPTION ON PREM/CABARET $ 1110.00

GOLD RUSH II INC

BUSINESS ADDRESS:
1830 COBB PARKWAY SOUTH
MARIETTA GA 30062-3755

THE CITY OF MARIETTA
1834

TOTAL $ 1110.00

SIGNED Darrell E Dickerson DATE PAID 10/17/94 PENALTY $ .00

DARRELL E DICKERSON

BUSINESS LICENSE DIVISION TOTAL $ 1110.00

APPENDIX C — ARTICLE III, SECTION VI, PARAGRAPH VII OF THE CONSTITUTION OF THE STATE OF GEORGIA

GEORGIA CONSTITUTION

Paragraph VII. Regulation of alcoholic beverages.

The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to counties and municipalities of the state for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law.

APPENDIX D — OFFICIAL CODE OF GEORGIA ANNOTATED, SECTION 3-2-7

3-2-7. Expiration and renewal of licenses generally; continuation of operations by licensee pending final approval or disapproval of application for renewal; penalty for late application for renewal; temporary permits.

(a) Except as otherwise specifically provided in this title, all licenses issued pursuant to this title shall expire on December 31 of each year and application for renewal shall be made annually on or before November 1.

(b) Any licensee making proper application, with all supporting documents, for a license to operate during the following calendar year and having filed the application prior to November 1 shall be permitted to continue to operate pending final approval or disapproval of the licensee's application for the following year if final approval or disapproval is not granted prior to January 1.

APPENDIX E — AFFIDAVIT OF COUNCILMAN FRANK T. AYERS

AFFIDAVIT OF FRANK T. AYERS

PERSONALLY before the undersigned officer, duly authorized by law to administer oaths, came Frank T. Ayers, who, after being sworn, deposes as follows:

1.

This affidavit is based upon my personal knowledge.

2.

My name is Frank T. Ayers, and I am the elected official representing Ward 6 of the City of Marietta, Georgia. I am currently the elected official for said position and was the elected official for said position on January 19, 1995.

3.

I attended the specially called meeting of the Marietta City Council on January 19, 1995, which commenced at approximately 6:00 p.m. and adjourned at approximately 10:00 p.m.

4.

At the conclusion of said meeting, I voted for the passage of Council Bill No. 400195, Ordinance Bill No. 5399, which is marked as "P-8" in my deposition.

Appendix E

5.

My vote on this Ordinance was an act carried out by me in my official capacity as the elected official for Ward 6 of the City of Marietta, Georgia and my vote was within my official duty as such elected official.

6.

My vote was taken in good faith and was not done or taken oppressively, maliciously, or corruptly. In voting on said Ordinance, it was not my intention to cause injury or damage to any specific person, firm, entity or organization; rather, it was my intention to adopt an Ordinance having general application throughout the City of Marietta.

7.

In voting on said Ordinance, I did not receive any pecuniary gain as a result of said vote, other than the normal salary set forth in the Marietta City Charter.

8.

In voting on said Ordinance, I was acting in a legislative capacity and performing a legislative function.

9.

In voting on said Ordinance, I relied upon the studies contained in the Record and contained in my deposition. I found said studies to be relevant to the City of Marietta, the problems faced by the City of Marietta and the problems addressed in the

Appendix E

Ordinance. I also relied upon the testimony and evidence presented at the public hearing. I also relied upon the advice of the City Attorney and the Constitutional Amendment approved by the voters of this State on November 8, 1994.

10.

My only motives for voting for said Ordinance are those stated in the preamble of said Ordinance. My personal feelings on any subject matter contained in said Ordinance did not enter into my vote.

This 5 day of December 1995.

s/ Frank T. Ayers
FRANK T. AYERS

Sworn to and Subscribed before me this
5 day of December, 1995.

s/ Shaun Renae Gee
Notary Public